IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM MAIN REGISTRY

CONSOLIDATED MISCELLANEOUS CIVIL CAUSES NO 88 AND 95 OF 2010-
(I.H. Juma, J.H. K. Utamwa, and S. Karua, JJJ.)

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 ARTICLE 30 (3), (4), CAP 2 R.E. 2002

AND

IN THE MATTER OF A PETITION FOR THE ENFORCEMENT OF THE BASIC RIGHTS UNDER THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, CAP. 3 R.E. 2002

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 148 (5) (a) (v) OF THE CRIMINAL PROCEDURE ACT (CAP 20 R.E. 2002) AS AMENDED BY THE WRITTEN LAWS (MISCELLANEOUS AMENDMENTS) ACT, 2007 ACT NO. 15 OF 2007

BETWEEN

1. MARIAM MASHAKA FAUSTINE
2. FORTUNATUS FAUSTINE MUGANZI
3. ROBERT PHARES MBETWA
4. DICKSON HEZRON MAIRA
5. MARCUS MUSSA MASILA
6. JUSTICE LUMIMA KATITI
7. FARAJI AUGUSTINO CHAMBO
8. JOYCE ADAM MWAMAGEMBO
9. SAMWEL JOHN RWENJU
10. HAGGAY NELSON MWATOMOKA
11. HOPE GEORGE LULANDALA

APPLICANTS

AND

1. ATTORNEY GENERAL..... 1ST RESPONDENT
2. THE DIRECTOR GENERAL
THE PREVENTION AND COMBATING
OF CORRUPTION BUREAU..... 2ND RESPONDENT

JUDGMENT

JUMA, J:

This judgment arises from the consolidation of Miscellaneous Civil Cause Number 88 of 2010 and Miscellaneous Civil Cause No. 95 of 2010. The two hitherto separate Miscellaneous Civil Causes shall collectively be referred to in this judgment as the Consolidated Miscellaneous Civil Causes No 88 and 95 of 2010).

On 21st October 2010, Mariam Mashaka Faustine (1st Petitioner), Fortunatus Faustine Muganzi (2nd Petitioner), Robert Phares Mbetwa (3rd Petitioner), Dickson Hezron Maira (4th Petitioner), Marcus Mussa Masila (5th Petitioner), Justice Lumima Katiti (6th Petitioner), Faraji Augustino Chambo (7th Petitioner) and Joyce Adam Mwamagembo (8th Petitioner) [hereinafter described as **"the eight petitioners"**] invoked the **Basic Rights and Duties Enforcement Act Cap 3** when they instituted the Miscellaneous Civil Cause No 88 of 2010 against the Attorney General (1st Respondent) to challenge the constitutionality of a paragraph under section 148-(5) (a) of the **Criminal Procedure Act, Cap. 20** (hereinafter referred to as **CPA**). Before proceeding further, we

must at this early stage point out at the confusion appearing on the face of the petition as to which between paragraphs (iv) and (v) of section 148-(5) of **CPA** disclose the offence of money laundering subject of this petition. In their petition and also in their written submissions, the eight petitioners have cited section **148 (5) (a) (iv) of the Criminal Procedure Act, [Cap. 20, R.E. 2002] as amended by the Misc. Laws (Amendment) Act, 2 of 2007** which they claim that insofar as it prohibits their admission to bail, violates their basic rights as guaranteed under the Constitution of the United Republic of Tanzania, 1977. We have deliberately underlined the cited section 148(5) (a) (iv) of **CPA** because our research found no law in Tanzania bearing the title: **Misc. Laws (Amendment) Act, 2 of 2007** which petitioners cited as amending section 148 of **CPA**.

Our research led us to the conclusion that instead of citing section **148(5) (a) (iv)** to move this Court in the present petition, the learned Counsel for eight petitioners should have cited **section 148(5) (a) (v)** of the **CPA**. We have come to this conclusion after reading two amendments on section 148 of **CPA.** The first of the two amendments was effected in 2002 when section 49 of the **Prevention of Terrorism**

Act No. 21 of 2002 [now **CAP. 19**] amended section 148 (5) (a) of **CPA** by adding a new paragraph: - ***"(iv)-terrorism against the Prevention of Terrorism Act, 2002."***

The second amendment was effected later in 2007 when section 19 of the **Written Laws (Miscellaneous Amendments) Act, 2007 Act No. 15 of 2007** amended section 148-(5) (a) of the **CPA** by adding a new paragraph which it inadvertently referred to as ***"(iv) money laundering contrary to the Anti-Money Laundering Act, 2006"*** instead of referring it as "(v)".

From the foregoing, proper provision of law which the eight petitioners should have cited is section **148.-(5) (a) (v) of CPA** as the provision that the Resident Magistrate's Court used to deny bail to the accused facing the offence of money laundering. The relevant section **148.-(5) (a) (v) of CPA** provides:

> "148-(5) A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if–
> (a) that person is charged with–
> (i) ...
> (ii) ..
> (iii) ...
> (iv) terrorism against the Prevention of Terrorism Act, 2002;

(v) **money laundering contrary to Anti-money Laundering Act, 2006; [Emphasis added]**

Because the inadvertent citation of **"section 148.-(5) (a) (iv)"** was occasioned by the wording of section 19 of the **Written Laws (Miscellaneous Amendments) Act, 2007 Act No. 15 of 2007** when it amended section 148-(5) (a) of **CPA**, we shall not penalize the eight petitioners, and for purposes of this petition we shall assume that the eight petitioners are contesting the constitutionality of **section 148(5) (a) (v)** of the **CPA** instead of the inadvertently cited section 148(5) (a) (iv) of **CPA**.

The eight petitioners would like this Court to declare as null and void, the above cited section 148 (5) (a) (v) of **CPA** which prohibits admission to bail of persons charged with the offence of money laundering. According to the eight petitioners, section 148 (5) (a) (v) of **CPA** contravene article 13 (1), (2), (3), (4), (5), (6) (a) and (b) of the **Constitution of the United Republic of Tanzania, 1977**. The eight petitioners believe that this Court has discretionary power to determine and even proceed to admit them to bail even though they are facing the charge of money laundering at the subordinate court.

Criminal case number 146 pending at the Resident Magistrate's Court of Dar es Salaam (at Kisutu) is the backdrop giving rise to this petition by eight petitioners. Of the 56 counts to which these eight petitioners pleaded not guilty on 22nd July 2010, includes 8th and 56th counts which disclose the offence of money laundering contrary to sections 3 and 12 (b) and (d), 13 (a) of the **Anti-Money Laundering Act, 2006 Act No. 12 of 2006**. It is common ground, first, the Resident Magistrate's Court strictly applied the letter of the law that the offence of money laundering is not bailable in terms of section 148 (5) (a) (v) of **CPA**, and second, the eight petitioners were consequently denied bail by the subordinate court. According to the eight petitioners, this statutory prohibition of bail contravenes article 13 (6) (b) of the Constitution in so far as it presumes their guilt. In addition, the eight petitioners contend that statutory prohibition of bail ties the discretionary hands of the judiciary to decide on bail leading the contravention of article 13 (6) (a) of the Constitution which guarantees the separation of powers.

On 8th November 2010 Samwel John Renju, Haggay Nelson Mwatonoka, Hope George Lulandala [**hereinafter referred to as the three petitioners**] and Justice Lumima Katiti (6th Petitioner) filed in

this Court the **Miscellaneous Civil Cause No. 95 of 2010** to challenge the legal appropriateness of the Director General of the Prevention and Combating of Corruption Bureau [**2nd Respondent herein**] to investigate and to prosecute some of the offences they face in the **Criminal Case Number 149 of 2010** at the Resident Magistrate's Court Kisutu. The 6th Petitioner and the three petitioners contend that the offence of conspiracy to commit an offence (c/s 384 of the **Penal Code, Cap. 16**) and offence of stealing (c/s 258 of the **Penal Code, Cap. 16**) for which they were charged, do not fall within the statutory mandate of the 2nd Respondent to investigate and/or to prosecute. That by investigating and/or by prosecuting these offences, the 2nd Respondent contravened the principles of good governance, rule of law and infringed their right to a fair trial as guaranteed by articles 13 (6) (a) and 15 (2) (a) of the Constitution.

The 6th Petitioner and the three other petitioners would like this Court to declare that the 2nd Respondent as a statutory body established under the **Prevention and Combating of Corruption Act No. 11 of 2007** (hereinafter referred to as **PCCA, 2007**) has no legal mandate to usurp the powers to investigate, arrest, search or prosecute offences

falling outside the **PCCA, 2007**. Petitioners are secondly moving this Court to declare that the 2nd Respondent not only contravened **PCCA, 2007** when it investigated, arrested the petitioners and prosecuting them in the **Criminal Case Number 149** at Kisutu Resident Magistrate's Court, but infringed their right to due process. For this infringement, 6th Petitioner and the three other petitioners believe that the 2nd Respondent is liable under section 8 (4) of **PCCA, 2007**. Petitioners are thirdly moving this Court to declare as a nullity, the **Criminal Case Number 149** pending at Resident Magistrate's Court and set them free unless they are arrested in accordance with the law.

In its reply to all the eleven petitioners dated 12th November 2010 the Attorney General on behalf of the Respondents not only put the eight petitioners to strict proof, but also pointed out that section 148 of the **CPA** governing bail to accused in its totality, neither takes away the discretionary powers of courts to determine bail in all cases nor does it impose a presumption of guilt on the accused. The Attorney General believes that the provisions of section 148 of **CPA** are fair, just and in tandem with article 13-(6) (b) of the Constitution of United Republic of Tanzania. The Attorney General disputed the contention that section

148 (5) (a) (v) of **CPA** has tied the hands of the Judiciary to grant bail regardless of circumstances and thus infringes article 13 (6) (a) of the Constitution. Further, the Attorney General notes that under the principle of separation of powers, the Judiciary is an independent creature of the Constitution with all the powers to consider application for bail in accordance with existing laws.

In so far as the **Miscellaneous Civil Cause No. 95 of 2010** is concerned, the Attorney General does not deny that officials of the 2nd Respondent detained the 6th petitioner and the three other petitioners on charges of conspiracy and stealing but later released these petitioners on police bail. However, the Attorney General insisted that at all that time the 2nd Respondent acted legally within his powers under **National Prosecutions Service (Appointment of Public Prosecutors) Notice, 2008** [hereinafter referred to as **GN No. 169 of 2008**]. According to the Attorney General, the 2nd Respondent has the power under the **GN No. 169 of 2008** to investigate, to charge and to prosecute the petitioners over offences which the 2nd Respondents discovers while investigating corruption offences.

The entire Petitioners' consolidated submissions were drawn and filed by six law firms. These law firms were; **the Prime Attorney, R.K. Rweyongeza & Co. Advocates, Decorum Attorneys, Marando, Mnyele and Co. Advocates, Mpoki & Associates Advocates and Law Associates**. With regard to constitutionality of section 148 (5) (a) (v) of the **CPA**, the learned Advocates agreed with the settled position of law that was restated in the cases of **R. V Peregrine Mrope, Criminal Cause No. 43 of 1989 (unreported); DPP Vs Daudi Pete [1993] TLR 22;** and **Prof. R. Mahalu and Another Vs AG Misc Civil Case No. 35 of 2007.** The settled law articulated in these cases is to the effect that remanding an accused person in prison does no amount to treating that person as a convict. But the learned Counsel hastened to submit a rider that a provision of a statute is unconstitutional if it is cast so widely as to cover unintended persons who do not pose any danger to the public safety or order. According to the Petitioners' Counsel, section 148 (5) (a) (v) of **CPA** fails the test of reasonably necessary and that it is too broad and covers unintended persons who do not pose any danger to public safety or order and should be declared unconstitutional. Further, it was contended on behalf of the Petitioners that the words "reasonably

necessary" implies that a provision is essential or requisite in the circumstances it is sought to be applied.

In their joint replying submissions on constitutionality of section 148 (5) (a) (v) of the **CPA**, Respondents contend that money laundering is serious offence and constitute a danger to public safety. Public interest; according to the Respondents, directly refers to the common well being and welfare of the people which are important ingredients of democracy, good governance and the rule of law. Respondents believe that the socio-economic effects of money laundering are injurious to public safety and economic development insofar as unlawful profits accruing from organized crimes is injected back into the economy as clean money which may end up into sponsoring organized crimes, piracy and even terrorism. Respondents are in no doubt that money laundering falls under the group of serious offences that can pose danger to public safety and the society is right to place these offences into a group of offences that are not bailable under section 148 (5) (a) (v) of **CPA**.

With regard to the Petitioners' submission that section 148 (5) (a) (v) of **CPA** is not "reasonably necessary" and is cast in unnecessarily wide terms, Respondents replied that article 15 (2) of the Constitution

allows reasonable interference with individual rights enumerated under article 13 of the Constitution in accordance with procedures prescribed by law. Respondents are in no doubt that the denial of bail for the petitioners was in the circumstances of the case reasonable, procedural, necessary, justified and necessary to safeguard public interest because denial of bail is saved by article 15 (2) (a) and 30 (2) (a) and (b) of the Constitution.

Similarly, Respondents do not agree with the contention that section 148 (5) (a) (v) of **CPA** is so broad as to cover even unintended persons. This provision, according to the Respondents only targets the petitioners as identifiable persons who were charged with money laundering offences arising from the different roles each played in the commission of money laundering offences. Charging the petitioners with offences arising from their different roles does not in the understanding of the Respondents, make section 148 (5) (a) (v) of **CPA** too broad to be unconstitutional.

On behalf of the Respondents, we were urged to look at a document titled "**Strategy for Anti-Money Laundering and Combating Terrorist Financing of July 2010-June 2013**" which the two

Respondents attached to their written submissions. This document, on paragraph 2.1, page 9 describes money laundering to be:

> "..... the process by which criminals attempt to hide and disguise the true origin and ownership of the proceeds of their criminal activities, thereby avoiding prosecution, conviction and confiscation of the proceeds of crime. In essence money laundering seeks to achieve two basic goals: the first one is to separate the perpetrator and the proceeds from the underlying crime/predicate offence while the second is to disguise the proceeds as legitimate funds or assets and hence allow the criminal to enjoy the benefits of criminal activities."

It was the Respondents' further submission that the above-mentioned strategy document for Anti-Money Laundering on its pages 10-12, identifies the adverse effects money laundering has in the attainment of country's national goals. That money laundering has the adverse effects of eroding the integrity of financial system thereby harming the country's reputation. That the petitioners while exercising and demanding their rights under Article 13 of the Constitution should be aware that Article 15-(2) allows reasonable interference of those rights in accordance with the prescribed procedures. That money-laundering threatens the economic, political and social stability.

It was the Respondents' further submission that in view of the adverse effects money laundering has on country's economic, political

and social stability, total denial of bail under section 148-(5) (a) (v) of **CPA** is justifiable to protect public interests in terms of paragraph (a) of sub-art (2) of article 15 and paragraph (b) of sub-art (2) of article 30 of the Constitution of United Republic of Tanzania.

From the foregoing, there are five issues that call for our determination. First, second and third issue are closely linked and need to be tackled in an integrated way.

The first issue is whether section 148 (5) (a) (v) of the **CPA** in so far as it denies bail to persons accused of offence of money laundering, contravenes article 13 (1) (2) (3) (4) (5) and (6) (a) and (b) of the Constitution which guarantees right to equality before the law. The second issue is whether the statutory prohibition of bail under section 148 (5) (a) (v) of CPA ties the discretionary hands of the courts to decide on bail leading the contravention of article 13 (6) (a) of the Constitution which guarantees the Petitioners' right to equality before the law. The third issue is whether this Court exercising its jurisdiction under the **Basic Rights and Duties Enforcement Act** has judicial discretion to determine and even proceed to grant bail to the accused charged with offences of money laundering.

The fourth and fifth issues are similarly closely linked. The fourth issue is whether the offence of conspiracy to commit an offence (c/s 384 of the **Penal Code, Cap. 16**) and offence of stealing (c/s 258 of the **Penal Code, Cap. 16**) for which the three petitioners herein and the 6th Petitioner were charged with fall outside the statutory mandate of the 2nd Respondent to investigate and/or to prosecute. The fifth issue is whether, by investigating, arresting and prosecuting the petitioners in **Criminal Cases Number 146 and 149** at the Resident Magistrate's Court at Kisutu, the 2nd Respondent not only contravened **PCCA, 2007** but also infringed the Petitioners' right to due process making the 2nd Respondent liable under section 8 (4) of **PCCA, 2007**.

Article 13 (1) (2) (3) (4) (5) and (6) (a) and (b) of the Constitution, which the Petitioners claim has been infringed by the application of section 148 (5) (a) (v) of the **CPA** states:

> 13.-(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.
>
> (2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.
>
> (3) The civic rights, duties and interests of every person and community shall be protected and determined by the

courts of law or other state agencies established by or under the law.

(4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.

(5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society.

(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;

(b) no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence;

On the first, second and third issues regarding prohibition of bail for petitioners charged with money laundering offences, it is clear from ably

presented submissions, the learned Counsel for the Petitioners and the Attorney General do not dispute the settled position of the law governing bail to the effect that there are certain prescribed situations under section 148 of **CPA** where bail is completely denied and no room is left for judicial discretion to grant any bail. This position of law was restated by Mwarija, J., on page 19 of the unanimous judgment of this Court (Jundu, JK; Rugazia, J.; and Mwarija, j) in **1. Prof. Dr. Costa Ricky Mahalu, 2. Grace Alfred Martin vs. Attorney General (supra)**:

> "...that **a provision of law regarding bail may have the effect of complete denial of bail** or **may allow grant of bail upon certain conditions being met** by an accused person before his release."-**Emphasis added.**

With due respect, Mwarija, J. has succinctly restated the net effect of section 148 of **CPA** when read as a whole and construed to give each word in its sub-sections operative effect. Section 148 of **CPA** has identified situations where an accused person may be admitted to bail subject to specified conditions. That section has also identified situations where admission to bail is completely prohibited.

It is apparent from the submissions of the learned Counsel that the bone of contention between the Petitioners and Respondents is whether

the total prohibition of bail to the petitioners (facing money laundering offences) under section 148-(5) (a) (v) of **CPA** sustainable because that prohibition is wholly designed to ensuring the wider national interests in respect to defence, public safety, public order' in terms of paragraph (b) of sub-art (2) of article 30 of the Constitution. This means that if this Court finds that the petitioners were denied bail under section 148 (5) (a) (v) of **CPA** because the offence of money laundering constitute a danger or threat to the interests of defence, public safety or public order, then section 148 (5) (a) (v) of **CPA** cannot be regarded as unconstitutional.

In our determination of the issues arising from this present petition, we shall seek the guidance of general principles governing the interpretation of the Constitution of United Republic of Tanzania which the High Court and the Court of Appeal of Tanzania, have through a number of cases, identified as relevant to the determination of the constitutional issues raised in petitions like this one. The Full Bench of this Court (Mapigano, Bubeshi and Kaji, JJ) in **Geofrey Eliawony and Three Others [1998] T.L.R. 190** reminds us that High Court is bound by the decisions of Court of Appeal on certain areas where the law is settled. This position is similar to an earlier decision of the Court of

Appeal in **Jumuiya ya Wafanyakazi Tanzania vs. Kiwanda cha Uchapishaji Cha Taifa [1988] TLR 146** which held that all courts and tribunals below the Court of Appeal are bound by the decisions of the Court of Appeal regardless of their correctness. It therefore follows that in our determination of issues, where the issue of law is settled by the Court of Appeal regarding any matter at hand, then this Court shall apply that settled law.

The Court of Appeal has settled the law to the effect that restrictions imposed on fundamental rights and freedoms must be strictly construed and the onus is upon those who rely on claw back clauses to justify restriction on basic rights: **Julius Ndyanabo vs. Attorney General [2004] TLR 14**. There is also the principle that no person shall enjoy his basic rights and freedoms in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest reflected in article 30(1): **Director of Public Prosecutions vs. Daudi Pete [1993] TLR 22.**

Another guidance of the Court of Appeal which was also restated by our brothers in **1. Prof. Dr. Costa Ricky Mahalu (supra)** is to the

effect that denial of bail to an accused person does not necessarily amount to treating such a person like a convicted criminal.

Court of Appeal in **Director of Public Prosecutions vs. Daudi Pete (supra)** restated the guidance on the doctrine of separation of powers. According to this guidance, the doctrine of separation of powers can be said to be infringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of the laws and the adjudication of rights and duties in disputes either between individual persons or between the state and individual persons. Court of Appeal has already laid down the law to the effect that legislation which prohibits the grant of bail to persons charged with specified offences does not necessarily amount to such a takeover of judicial functions by the Legislature.

The Court of Appeal has also settled the question of presumption of constitutionality of Acts of Parliament. In the case of **Julius Ndyanabo vs. Attorney General [2004] TLR 14** the Court of Appeal stated that until the contrary is proved, a piece of legislation or a provision in a statute shall be presumed to be constitutional. The Court of Appeal regarded it as a sound principle of constitutional construction that, if

possible, a legislation should receive such a construction as will make it operative not inoperative.

With the hindsight of the aforementioned settled principles on constitutional interpretation in our mind, we propose to revert back to the issue whether section 148 (5) (a) (v) of **CPA** is for the interests of defence, public safety or public order within the objective of paragraph (b) of sub-art (2) of article 30 of the Constitution. As we observed earlier, the petitioners do not dispute the settled law that section 148-(5) (a) of **CPA** identifies situations where admission to bail is clearly prohibited with regard to the offences of murder, treason, armed robbery, terrorism and money laundering. We are of the considered opinion that where the intention of the legislature is clear, as it is in section 148.-(5) (a) (v) of **CPA**, that intention must be given effect by police officers in charge of police station or any court before whom an accused person is brought or appears. What the petitioners contend is that their denial of bail is not for interests of defence, public safety or public order.

As we have observed earlier, the case of **Director of Public Prosecutions vs. Daudi Pete (supra)** has expounded paragraph (b) of sub-article (2) of article 30 of the Constitution of United Republic of

Tanzania encapsulating the principle that no person shall enjoy his basic rights and freedoms in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest. Article 30 provides:

> **30.**-(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.
>
> (2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of-
>
> (a)....
>
> (b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit;

In order to gauge whether the offence of money laundering poses great risks to the interests of defence, public safety, public order within the scope prescribed in paragraph (b) of sub-art (2) of article 30 of the Constitution of United Republic of Tanzania, we propose to sample out

particulars of offence of money laundering for which the petitioners are charged. Particulars of 8th count facing all the eight petitioners herein allege that:

> *"... on divers dates between 3rd July and 31st July 2008, within the City and Region of Dar es Salaam, jointly and together, did transfer Tanzanian Shillings Six Hundred Seventy One Million, Two Hundred Twelve Thousand, Three Hundred Seventy Nine and Ninety Two Cents (Tshs. 671,212,379.92) from Account No. 01J1007892600 operated by Trade Union Congress of Tanzania (TUCTA) at CRDB Bank Ltd to Account Numbers: 01J028402800 operated by MILLENIUM PROMOTIONS LTD at CRDB Bank Ltd, 018101006845 operated by TUCTA at National Bank of Commerce, Mnazi Branch and Account No. 04710300144 operated by ROMOS TECHNOLOGY LTD at National Bank of Commerce, while they knew or ought to have known that the same money was a proceed of forgery, which is a predicate offence, for purposes of disguising the illicit origin of that money or assisting the persons involved to evade legal consequences of their actions."*

We have paid due regard to submissions made by the two opposing sides on the interests served by total prohibition of bail to accused persons facing offences relating to money laundering. We read both the particulars drafted by the prosecution in the Resident Magistrate's Court-Kisutu that disclose the offence of money laundering and also the

Strategy document for **Anti-Money Laundering and Combating Terrorist Financing**.

We similarly do not therefore agree with the Petitioners that their right to be treated according to law and hence their right to fair trial was violated by the 2nd Respondent. The question whether the petitioners were unintended persons who do not pose any danger to public safety is a matter for the trial court to determine after hearing the evidence. Particulars of offence of money laundering have in our view initially identified the petitioners and their respective roles. It is now upon the trial court to hear evidence from both sides before determining the guilt or innocence of the petitioners.

We are also satisfied that in as much as money laundering activities can undermine the integrity and stability of national and international financial institutions and systems, they have destabilizing effect posing national insecurity and threatens the economic security of the whole country. We are therefore of the opinion that section 148-(5) (a) (v) of **CPA** which prohibits an admission to bail to accused persons charged with offence of money laundering is constitutional and in the best interests of defence, public safety, public order within the scope

prescribed in paragraph (b) of sub-art (2) of article 30 of the Constitution of United Republic of Tanzania. **Section 122 of the Law of Evidence Act, Cap 6** allows courts in Tanzania to infer the existence of any fact which it thinks likely to have happened from common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. This Court has inferred from the **Strategy for Anti-Money Laundering and Combating of Terrorist Financing (supra),** that Tanzania and the international community has so far made efforts to fend off the vice of money laundering and its potential link to terrorist financing. Parliament is therefore entirely justified to shut out these offences from admission to bail. This Court in **Geofrey Eliawony & 3 Others Vs. R. (supra)** observed that Court of Appeal has already through cases of **Daudi Pete** and **Kukutian Pumbun (supra)** settled the law that accused persons who are denied bail are so denied on the basis of their actions or conduct.

With regard to constitutionality of section 148-(5) (a) (v) **CPA** we have also addressed the consequential issue whether the denial of bail to petitioners passed non-arbitrary, proportionality and necessity tests set by the Court of Appeal of Tanzania. The Court of Appeal in the case

Mbushuu alias Dominic Mnyaroje and Another vs. Republic 1995 TLR 97 (CA) enunciated the principle that derogation from basic rights of the individual in the name of public interest under Article 30 of the Constitution; should not be arbitrary and should also pass the proportionality test. In other words, the limitation to admission to bail that is imposed under the cover of interests of defence, or for public safety, or for public order; should not be more than reasonably necessary. In other words, section 148-(5) (a) (v) of **CPA** which prohibits grant of bail in public interest under Article 30 must not only be non-arbitrary, it must additionally pass the proportionality test. Limitation of bail should not be more than reasonably necessary.

The Court of Appeal also in **Mbushuu alias Dominic Mnyaroje (supra)** referred back to its earlier decision in **Kukutia Ole Pumbun v Attorney General [1993] TLR 159** wherein it explained that safeguard against arbitrariness meant that the law under investigation should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. In order to determine whether or not provisions that were employed to deny the petitioners bail make adequate safeguards against

arbitrary decisions, and provide effective controls against abuse by those in authority section 148 of CPA must be considered in its totality.

To determine whether this Court should strike down section 148-(5) (a) (v) of **CPA** for failing proportionality test, we will seek a further persuasive guidance of a case decided by the Supreme Court of Canada-**R. v. Oakes [1986] 1 S.C.R. 103 [Sourced from the Judgments of the Supreme Court of Canada, in http://scc.lexum.org/en/1986/1986scr1-103/1986scr1-103.html]**.

In that case Mr. David Edwin Oakes (Respondent therein) was charged under section 4(2) of the **Narcotic Control Act** with an offence of unlawful possession of a narcotic for the purpose of trafficking. Mr. Oakes was convicted only of unlawful possession. The offence was about possession for the purposes of trafficking. Mr. Oakes challenged the constitutionality of section 8 of the **Narcotic Control Act** in so far as it presumed Mr. Oakes was in possession of narcotic for the purpose of trafficking and the onus was on Mr. Oakes to prove the contrary. The Ontario Court of Appeal, on an appeal by the Crown found that section 8 of the **Narcotic Control Act** constituted a "reverse onus" clause and was therefore unconstitutional because it violated the presumption of

innocence entrenched in section 11 (d) of the **Canadian Charter of Rights and Freedoms**. The Crown appealed and a constitutional question was stated as to whether section 8 of the **Narcotic Control Act** violated section 11 (d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that section 11(d) of the Charter had been violated, was the issue of whether or not section 8 of the **Narcotic Control Act** was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of section 1 of the Charter.

On its face value; section 148-(5) (a) (v) of **CPA** which prohibits grant of bail to those accused of the offence of money laundering conflicts with several individual rights under article 13 of the Constitution. This article 13 guarantees right to equality before the law without any discrimination. This implies the right of petitioners facing money laundering offences to be admitted to bail without any discrimination. Right to be presumed innocent till found otherwise by a court of law is also embedded under article 13 of the Constitution.

In order for section 148-(5) (a) (v) of **CPA** to remain constitutionally valid under the persuasive guidance of the Canadian case

of **R. v. Oakes (supra)**, the limits which section 148-(5) (a) (v) of **CPA** places on petitioners' admission to bail must be reasonable and demonstrably justified in a free and democratic society:

> "....must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be."- **R. v. Oakes (supra) page 5.**

In **R. v. Oakes (supra)** the Supreme Court of Canada applied the proportionality test and saw no rational connection between the basic fact of possession of narcotics by Mr. David Edwin Oakes and the presumed fact of his possession for the purpose of trafficking. The Supreme Court was of the clear opinion that possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Section 148-(5) (a) (v) of CPA which prohibits bail to accused persons facing offence of money laundering is starkly different from section 8 of the **Narcotic Control Act** of Canada which presumed that whoever is found in possession of narcotic drugs in Canada is presumed to be in possession for purposes of trafficking. In our opinion, section 148 (5) (a) (v) of **CPA** has neither taken away the petitioners' right to be heard in the subordinate court nor thrown upon them the burden of proving their innocence. The petitioners are presumed innocent till otherwise is proved. It is our further opinion that the objective being sought to prohibit bail under section 148 (5) (a) (v) of **CPA** is sufficiently important to safeguard the society and public interests likely to result from the dangers posed by money laundering. We are also satisfied the denial of bail is a reasonable way to safeguard the public interests.

Further, a proportionality of section 148 (5) (a) (v) of **CPA** must also be viewed in the context of the whole of section 148 of **CPA** governing on hand, situations when bail is available with conditions and on the other hand situations when admission to bail is completely excluded in criminal cases. Looked upon in that totality, as we have hinted before, section 148 of **CPA** provides several different and distinct

circumstances where courts can exercise judicial discretion to admit accused persons to bail and circumstances where bail is completely taken away. Section 148 (5) (a) (i), (ii), (iii), (iv) and (v) provides distinct circumstances where the legislature has completely prohibited bail to specified offences.

It is important at this juncture to highlight the difference between this petition before us and the petition of **1. Prof. Dr. Costa Ricky Mahalu, 2. Grace Alfred Martin vs. Attorney General (supra). Prof. Mahalu's** petition was determination whether section 36 (4) (e) of the **Economic and Organized Crime Control Act, Cap. 200 R.E. 2002** contravenes the presumption of innocence provided for under Article 13 (6) of the **Constitution of United Republic of Tanzania**. Unlike section 148-(5) (a) (v) of **CPA** subject of petition before us which completely prohibits bail where the offence a person is charged with is money laundering, section 36 (4) (e) of the **Economic and Organized Crime Control Act** (subject matter in **Prof. Mahalu's Petition**) on the other hand governs situations where bail is not completely prohibited with respect to offence involving property whose value exceeds ten million shillings.

In the case of **Prof. Dr. Costa Ricky Mahalu (supra),** the petitioner was required to fulfill the condition of paying cash deposit equivalent to half the value of the property, and the rest is secured by execution of a bond. In other words, in the petition before us, section 148-(5) (a) (v) of **CPA** completely prohibits bail, whereas this Court in the case of **Prof. Dr. Costa Ricky Mahalu** was dealing with section 36 (4) (e) of the **Economic and Organized Crime Control Act** which allowed bail but under stringent conditions.

This petition before us is about the constitutionality of distinct provisions on bail where the legislature has completely prohibited any admission to bail to accused persons facing money laundering offences. In our opinion, where the law is so clear and unambiguous, this Court shall take that law to mean exactly what it actually says. This Court shall have no liberty other than to ensure that the mandatory language of the statute is given effect of. In our opinion, the law in Tanzania is settled that provisions like section 148-(5) (a) (v) of **CPA** which completely prohibit the grant of bail to persons charged with specified offences are not by that reason alone unconstitutional if they are to the best interests of defence, or public safety, or public order within the

scope prescribed in paragraph (b) of sub-art (2) of article 30 of the Constitution.

It remains upon the legislature to change the total prohibition of bail for offences like murder, treason, armed robbery, defilement, illicit trafficking in drugs, offences involving heroin, cocaine, terrorism and money laundering which are specifically singled out under section 148 (5) (a) (i), (ii), (iii), (iv), (v) of **CPA**. Once the Parliament has in clear terms designated these serious offences to be un-bailable, the courts are to apply the laws applicable unless there is discrimination or the law is applied in arbitrary manner or does not pass the proportionality test, this has been the stance of this Court and the Court of Appeal.

It is our opinion that decisions of Resident Magistrate's Court of Dar es Salaam (at Kisutu) in **Criminal Cases Number 146 and 149 of 2010** denying bail to the petitioners with regard to offence of money laundering, is the interpretation that reflects the true meaning, intent and spirit of subsection section 148.-(5) (a) (v) of **CPA**. We are also fully satisfied that the total statutory prohibition of admission to bail under section 148 (5) (a) (i), (ii), (iii), (iv) and (v) of CPA does not amount to denying an accused a proper opportunity of being heard.

From the foregoing, the petitioners' prayers seeking a declaration by this Court that section 148 (5) (a) (v) of CPA is null and void for contravening article 13 (1), (2), (3), (4), (5) and 6 (a) and (b) is devoid of merit and is hereby dismissed.

Our conclusion that section 148 (5) (a) (v) of CPA which was employed to deny bail to the petitioners is constitutional is also relevant to the second issue regarding whether this Court can exercise its judicial discretion to grant bail over offences relating to money laundering which the intention of the legislature is to clearly prohibit any such grant of bail. We are aware that section 149 of **CPA** provides for the power of High Court to vary terms of bail set by the lower court:

> **149.** Where in connection with any criminal proceedings a subordinate court has power to admit any person to bail but either refuses to do so or does so or offers to do so on terms unacceptable to him, the High Court may admit him or direct his admission to bail or, where he has been admitted to bail, may vary any conditions on which he was so admitted or reduce the amount in which he or any surety is bound to discharge any of the sureties.

In our opinion, notwithstanding the power of High Court under section 149 of **CPA** to vary terms of bail set by subordinate courts, this Court cannot exercise its judicial discretion to grant bail where the

intention of the legislature is clearly to prohibit admission to bail in specified offences, if that prohibition to bail is also saved on ground of the best interests of defence, or public safety, or public order within the scope prescribed in paragraph (b) of sub-art (2) of article 30 of the Constitution. Not even section 149 of the **CPA** can be resorted to by this Court to vary or grant bail where the intention of the legislature is clearly to completely deny bail. Section 149 of **CPA** applies only where admission to bail is not completely prohibited by the legislature.

With regard to the issues revolving around the submission that the statutory prohibition of bail under section 148 (5) (a) (v) of CPA ties the discretionary hands of the judiciary, our finding and holding is again that this Court cannot exercise its judicial discretion to grant bail where the intention of the legislature is clearly to prohibit admission to bail.

We propose next to address fourth and fifth issues arising from the contention by the 6th Petitioner and the three other petitioners that the 2nd Respondent had no legal mandate to usurp the powers to investigate, arrest, search or prosecute offences falling outside **PCCA, 2007**. And these Petitioners would like this Court to declare that the 2nd Respondent not only contravened **PCCA, 2007** when it investigated,

arrested the petitioners and prosecuting them in the Criminal Case Number 149 at Kisutu Resident Magistrate's Court, but infringed their right to due process.

Learned Counsel for 6th Petitioner and the three other petitioners have premised their submission by citing Article 14 of the Constitution governing the right to live and enjoy the protection of the law, article 13 of the Constitution on equality before the law and right to a fair hearing. According to the Petitioners' learned Counsel; it is the Police but not the 2nd Respondent who under section 5 of the **Police Force and Auxiliary Services Act, Cap. 322 R.E 2002,** are mandated to investigate, to arrest and prosecute them. The learned Counsel further contended that the arrest, investigation and prosecution of the 6th Petitioner and other three petitioners by the 2nd Respondent, violated their right to be treated according to law and hence their right to fair trial.

We were urged to note that in so far as the 2nd Respondent had no power to arrest them; his action is arbitrary and abrogated the principle of good governance. That learned Counsel believe that the scope of the power of the 2nd Respondent to arrest is restricted to matters of corruption and related offences specifically those provided in the **PCCA,**

2007. They cited section 8 (2) (c) of **PCCA, 2007** to support their understanding of this scope of power of the 2nd Respondent. Section 8 (2) (c) of **PCCA, 2007** provides:

> "...to arrest, enter premises, search, detain suspects and seize property where there is a reasonable cause to believe that an offence involving corruption has been or is about to be committed by the suspect in the premises or in relation to the property."

The Attorney General advocating for the Respondents agreed with the Petitioners that section 7 (e) of the **PCCA, 2007** empowers the 2nd Respondent to investigate offences involving corruption. But the Attorney General hastened to point out that this law does not prevent the 2nd Respondent from investigating the offences under any other laws which arise while the 2nd Respondent is investigating offences under the **PCCA, 2007**. The Attorney General submitted further that commission of the offence of money laundering includes some aspects of corruption. And that it can rightly be said that the 2nd Respondent was and still is mandated to investigate and prosecute criminal cases Number 146 and 149 of 2010 pending at Kisutu Resident Magistrate's Court.

It was the Attorney General's further case that all investigations by the 2nd Respondent is checked, balanced and supervised by the Director

of Public Prosecutions (hereinafter referred to as **DPP**). That 2nd Respondent has no room to act in an arbitrary and tyrannical manner. According to the Attorney General, section 57 (1) of the **PCCA, 2007** expounds the supervising power of the DPP who is required to give his written consent before any prosecution under this Act can be instituted. This power of the DPP further protects the citizens from any possible arbitrariness.

The Attorney General referred us to the provisions of section 8 (2) (b) and (c) **PCCA, 2007** which confers on officers of the 2nd Respondent powers equivalent to that enjoyed by police officers. The Attorney General further contended that there is no complete separation of exercise of statutory powers between the functions of Police and those of the 2nd Respondent since the cited section 8 (2) (c) of **PCCA, 2007** vests in 2nd Respondent the power to investigate, enter premises, detain suspects, to arrest for purposes of prevention and combating of corruption, and section 8 (2) (b) further states that at the time of arrest the arresting officer shall exercise the powers of or above the rank of Superintendent of Police in accordance with the provisions of the **Police Force and Auxiliary Service Act, Cap. 322 R.E. 2002**.

We propose to look at the relevant statutory provisions before we determine whether the investigation, arrest and prosecution of Petitioners by the 2nd Respondent for offences not specifically provided for under **PCCA, 2007** exceeded 2nd Respondent's statutory mandate. Article 59B (2) of the Constitution vests on the Director of Public Prosecutions overriding and controlling powers over the institution, prosecution and supervision of all criminal prosecutions in Tanzania:-

> 59B (2) The Director of Public Prosecutions shall have powers to institute, prosecute and supervise all criminal prosecutions in the country.

This constitutional power of DPP has been expounded by several statutory provisions like the **CPA** and the **National Prosecutions Service Act, 2008 Cap 430 R.E. 2002** (hereinafter referred as **NPSA, 2008**). Section 9 (1) of the **NPSA, 2008** vests on the DPP control over all prosecutions in Tanzania. Further, the DPP has the power to direct the police or other investigative organs like the 2nd Respondent to investigate the commission of any offence. The relevant section 9.-(1) of **NPSA, 2008** provides:-

> 9.-(1) Notwithstanding the provisions of any other law, the functions of the Director shall be-

(a) to decide to prosecute or not to prosecute in relation to an offence;

(b) to institute, conduct and control of any offence other than court martial;

(c) to take over and continue prosecution of any criminal case instituted by another person or authority;

(d) discontinue at any stage before judgment is delivered any criminal proceeding brought to the court by another person or authority;

(e) to direct the police and other investigative organs to investigate any information of a criminal nature and to report expeditiously.

Further, section 22-(1) **NPSA, 2008** empowers the DPP to appoint a person to be a public prosecutor from other Departments of Government, local government authority or private practice to prosecute a specified case or cases on behalf of the DPP.

The Attorney General also cited section 8-(2) of the **PCCA, 2007** as governing situations where officers of the 2nd Respondent can exercise powers of police officers under the **Police Force and Auxiliary Services Act**:

8-(2) A person authorised by the Director-General to perform functions under this Act shall have and exercise the powers-

(a)....

(b)- of a police officer of or above the rank of Assistant Superintendent of Police and the provisions of the Police Force and Auxiliary Services Act conferring upon police officers, powers necessary or expedient for the prevention, combating and investigation of offence; and

(c)- to arrest, enter premises, search, detain suspects and seize property where there is a reasonable cause to believe that an offence involving corruption has been or is about to be committed by the suspect in the premises or in relation to the property.

Section 57 of the **PCCA, 2007** provides for the superintendence role of the DPP over the 2nd Respondent with regard to sanction:

57.-(1) Except for offences under section 15, prosecution for an offence under this Act shall be instituted with written consent of the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall, within sixty days, give or withhold consent for prosecution.

From the foregoing provisions of law, we are of the considered opinion that the 2nd Respondent is vested with the requisite statutory mandate to investigate; to arrest and prosecute offences other than corruption related offences under the **PCCA, 2007** under the supervision of the DPP. The DPP has on several occasions employed his powers

under section 22 of the **National Prosecutions Service Act, 2008** to appoint officers of the 2nd Respondent to be public prosecutors for purposes of prosecuting offences under any other law arising from investigation of offences under the **PCCA, 2007**. A case in point here is the **National Prosecutions Service (Appointment of Public Prosecutors) Notice, 2008 GN No. 169 of 2008** which the DPP used to appoint seventeen officers of the 2nd Respondent:

> ..... to be public prosecutors for **the purpose of prosecuting criminal offences under any other law arising from investigation of offences** under the Prevention and Combating of Corruption Act, 2007.- Reg. 2.-(1)- ***[emphasis added]***

We are therefore satisfied that section 22 of the **National Prosecutions Service Act, 2008** empowers the DPP to issue appropriate notice to vest on appointed officers of the 2nd Respondent with power to prosecute offences that arise while investigating offences under the **PCCA, 2007**. By looking at all the counts read over to the petitioners, we are satisfied that the 2nd Respondent was within his statutory mandate to investigate and prosecute offence of conspiracy to commit an offence (c/s 384 of the **Penal Code, Cap. 16**), offence of stealing (c/s 258 of the **Penal Code, Cap. 16**) for which the Petitioners

were charged because the offences arose while the 2nd Respondent was investigating offences under **PCCA, 2007**.

We found nothing that is unconstitutional in section 22 of the **NPSA, 2008** which empowers the DPP to appoint officers of the 2nd Respondent to prosecute offences that arise while they are investigating offences under the **PCCA, 2007.** Guided by the presumption of constitutionality of section 22 of the **NPSA, 2008** we are satisfied that the arrests of the Petitioners, their investigation and prosecution were carried by the 2nd Respondent while the latter was exercising his statutory mandate. With this finding that the 2nd Respondent was within his statutory mandate, the 2nd Respondent is consequently not liable under section 8 (4) of **PCCA, 2007** which makes the 2nd Respondent or a person authorized by him liable if, without reasonable ground they conduct any search on a person, place or building. We thus do not agree with the Petitioners that Criminal Cases Number 146 and 149 pending at Resident Magistrate's Court at Kisutu were procured through unlawful investigation, arrest and prosecution.

In the final analysis, we agree with Respondents that this petition has no merit. The Consolidated Miscellaneous Civil Causes No 88 and 95 of 2010 are hereby dismissed with costs.

DATED at DAR ES SALAAM this 15th day of December, 2011

I.H. JUMA,
JUDGE

J. H. K. UTAMWA,
JUDGE

S. V. G. KARUA,
JUDGE

Order: Judgement is delivered in the presence of parties on record.

Present on record:

1. For 1st petitioner – Mr. Aliko, Advocate (for Mr. Ndusyepo, Advocate)
2. For 2nd petitioner - Mr. Aliko, Advocate (for Mr. Ndusyepo, Advocate)
3. For 3rd petitioner - Mr. Aliko, Advocate (for Mr. Ndusyepo, Advocate)

4. For 4th petitioner – Mr. Mpoki, Advocate

5. For 5th petitioner - Mr. Aliko, Advocate (for Mr. Rweyongeza, Advocate)

6. For 6th petitioner - Mr. Aliko, Advocate (for Mr. Rweyongeza, Advocate)

7. For 7th petitioner – Mr. Mpoki, Advocate (for Mr. Lugua, Advocate)

8. For 8th petitioner – Mr. Cuthbert Tenga (Advocate)

9. For 9th petitioner – Mr. Mpoki, Advocate (for Mr. Magafu, Advocate)

10.For 10th petitioner – Mr. Mpoki, Advocate (for Mr. Magafu, Advocate)

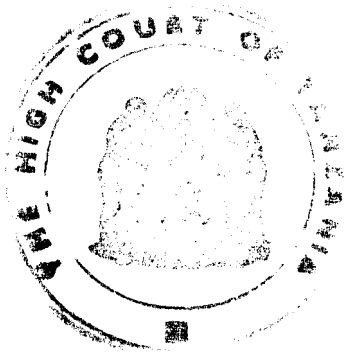
11. For 11th petitioner – Mr. Mpoki, Advocate

For 1st Respondent – Ms. Sylivia Matiku, Senior State Attorney.

For 2nd Respondent – Ms. Lilian William, Advocate.

I.H. JUMA,
JUDGE

J. H.K. UTAMWA,
JUDGE



S. V. G. KARUA,
JUDGE